United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2276

ORIGINAL

To be argued by
VICTOR A. KOVNER

In The

United States Court of Appeals

For The Second Circuit

WEITNAUER TRADING COMPANY LTD.,

Plaintiff-Appellee,

- against -

MORTON L. ANNIS,

Defendant-Appellant.

Appeal from a Judgment of the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFF-APPELLEE

WIKLER GOTTLIEB TAYLOR
& HOWARD
Attorneys for Plaintiff-Appellee
40 Wall Street
New York, New York 10005
422-1080

LANKENAU KOVNER & BICKFORD
Trial Counsel for Plaintiff-Appellee
30 Rockefeller Plaza
New York, New York 10020
489-8230

VICTOR A. KOVNER
JOHN C. LANKENAU
Of Counsel

(8052) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N. J. (201) 257-6850 | New York, N. Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D. C. (202) 783-7288

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

CASES PAGE

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WEITNAUER TRADING COMPANY LTD.,	:	
Plaintiff-Appellee,	:	Docket No. 74-2276
-against-	:	
MORTON L. ANNIS,	:	
Defendant-Appellant	:	

BRIEF FOR PLAINTIFF-APPELLEE

Preliminary Statement

This is an appeal by the defendant from a final judgment of the United States District Court for the Southern District of New York dated October 2, 1974 (461).* The judgment, which amended an earlier judgment dated June 19, 1974 by increasing the interest allowed (457), was made pursuant to a memorandum and order dated June 13, 1974 by Honorable Robert L. Carter, District Judge (444-455) after a two-day trial without a jury. In his opinion, Judge Carter awarded judgment in favor of plaintiff in the amount of $182,065.44, together with interest.

* Number references are to pages of the Appendix.

The Pleadings

The complaint ("Complaint") of plaintiff, a Swiss import-export corporation engaged in the sale and distribution of wine and liquor in the United States, seeks to enforce against the defendant a personal guarantee of the liabilities of Intercontinental Wines and Spirits, Ltd. ("Intercontinental"), a now defunct New York corporation which had been engaged in purchasing wines and liquors in Europe for resale in the United States (4-5). The complaint alleges that Intercontinental engaged plaintiff to purchase for Intercontinental wines and liquors and ship the purchases to Intercontinental (4-5). The complaint alleges that defendant guaranteed Intercontinental's liabilities to plaintiff initially in the amount of $100,000, plus all expenses of collection including reasonable attorney's fees, pursuant to a letter dated September 30, 1969, and that later the amount of $100,000 was increased to $150,000 (5-6). The complaint further alleges that plaintiff sold and invoiced Intercontinental for plaintiff's purchases of wines and liquors; that Intercontinental is indebted to plaintiff in excess of $150,000; plaintiff duly demanded that defendant honor the guarantee by the payment of $150,000; and that defendant has refused to make payment on his guarantee (6).

Defendant's answer denies the execution of the September 30, 1969 letter guarantee of $100,000 plus collection costs and the increase in the guarantee to $150,000 plus collection costs (14). By failing to deny the allegations of paragraphs 8 and 9 of the complaint (6), defendant's answer admits that the unpaid indebtedness of Intercontinental to plaintiff for liquor products purchased by plaintiff and shipped and sold to Intercontinental was in the total amount of $174,496.20 and that Intercontinental failed and refused to pay the amount owed plaintiff (14-16).

The answer alleges three affirmative defenses. The first affirmative defense asserts that plaintiff had purchased $40,000 of convertible bonds from Intercontinental (14-15). The second affirmative defense claims that defective merchandise was shipped to Intercontinental in the aggregate amount of $60,000 (15). The third affirmative defense alleges that plaintiff agreed to share with defendant the profits earned by plaintiff pursuant to the sales made to Intercontinental by plaintiff (15-16).

STATEMENT OF FACTS

Since the plaintiff's proof was virtually uncontroverted, the Court below noted that"the issues in this case

do not appear unduly complex" (445).

Plaintiff is a Swiss corporation with offices in Basle, engaged in the international wholesale and retail distribution of principally tobacco, liquors, wines and perfumes (38-39).

In May 1968 defendant, Morton L. Annis, Sr., who was then a senior officer and director of the General Cigar Company, first visited plaintiff's office in Basle, Switzerland, in connection with certain pending matters between plaintiff and General Cigar Company (40). In July 1968 defendant informed plaintiff that he was considering the formation of a liquor and wine importing and distribution company in the United States (40), and on October 16, 1968 an agreement was entered into between plaintiff and defendant individually, which provided that plaintiff and defendant would share equally the net profit or commission to be charged by plaintiff on purchases of liquor products ordered by defendant's distribution facility in the United States (292-293). The net profit would be determined after deducting the expenses incurred by both parties (40-44).

In early 1969 defendant advised plaintiff that the new company to be organized in the United States to purchase

liquor would be called Intercontinental Wine and Spirits Ltd. (295-296), and that he had engaged Mr. Ronald Kassin and Mr. Ed Radisch to operate the company on a full-time basis (297). Defendant advised plaintiff that he planned an early public offering of securities of Intercontinental and offered to plaintiff the opportunity to buy certain convertible bonds of Intercontinental when and if issued (300-31). Although plaintiff initially agreed in principle to purchase $40,000 of such convertible bonds when and if issued (434-436), the essential terms of bonds were never agreed upon by the parties (58-59). When the public offering did not occur, plaintiff agreed in July 1969 to advance $40,000 to Intercontinental as an initial short-term credit (302-304).

During the summer of 1969, the parties agreed upon the following procedure in connection with the purchase of liquor and wine in Europe: Plaintiff would make initial contact with liquor suppliers, recommend appropriate product lines and appropriate labeling, and then Intercontinental would negotiate the price directly with the supplier. Once the price was determined, plaintiff would negotiate payment terms. An order would be then issued by Intercontinental directly to the supplier with a copy to plaintiff (sometimes

the copy went to the supplier). Plaintiff, acting for Intercontinental, would then assume liability for the payment of the order by confirming such order with the supplier (63-65). Plaintiff paid for Intercontinental's order when due and would then invoice Intercontinental the cost of the merchandise plus a ten (10%) percent commission (66-67). Four (4%) percent of this commission was to be held by plaintiff as a credit for the account of Intercontinental, to be used for its expenses in Europe, and the remaining six (6%) percent was, pursuant to the October 16, 1968 agreement, to be divided equally between defendant and plaintiff after deduction of various expenses* (67-69). Defendant asked that his interest in those profits be kept secret from his associates in Intercontinental (307).

A. Defendant Provides Plaintiff with the September 30, 1969 Guarantee

By late August, 1969, Intercontinental's initial orders, copies of which had been forwarded to plaintiff for confirmation of liability, amounted to approximately $100,000 (69), and plaintiff advised defendant that it would

* On certain products, the total commission was to be eight (8%) percent, with four (4%) percent to be divided after expenses (67).

not become liable for orders in that amount until it received defendant's personal guarantee (69). In August, there was one minor shipment of samples to Intercontinental in the amount of $202.71 (102) but other shipments were not made until after defendant's personal guarantee had been received (102).

In September 1969 plaintiff called defendant by telephone and asked him for his personal guarantee of Intercontinental orders to be confirmed by plaintiff (69-71). Defendant answered that he would give his personal guarantee to plaintiff (71-72).

In September 1969 Mr. Meier came to New York for the sole purpose of securing defendant's personal guarantee. After reviewing defendant's personal financial statement with other officers of plaintiff, he directed plaintiff's New York attorney, Mr. Gottlieb, to prepare a form of personal guarantee by defendant (73-74) which was then presented to defendant by Mr. Meier at a dinner meeting held at the "21" Club on September 24 or 25, 1969 (74-75; 312-313). After discussing the matter with his associates that evening, defendant informed Mr. Meier that he wished to review the language of the form of guarantee submitted with his attorney (87; 193-4).

On October 1, 1969, Mr. Meier received a telegram from Intercontinental advising him that a signed copy of the requested guarantee had been forwarded to Mr. Gottlieb's office (314), which was confirmed by letter and cable from Mr. Gottlieb (429-430). On October 6, 1969 Mr. Meier received a telegram from defendant in Florida, confirming that the guarantee had been signed and delivered to Mr. Gottlieb (315). On or about the same date, Mr. Meier received the executed guarantee which had been retyped on Intercontinental's stationery and modified only in that it provided three signature lines, and contained the signatures of defendant, and Mr. Kassin as President of Intercontinental (316-318). Both signatures were witnessed by Mr. Howard Keiser, executive assistant to Mr. Kassin at Intercontinental.

Mr. Ordway Hilton, plaintiff's handwriting expert, testified that in his opinion defendant had executed the September 30, 1969 guarantee (226).

At the trial, presumably to contravene his execution of the September 30, 1969 guarantee, defendant, when asked whether he affixed his signature to this letter, merely testified:

> "I do not recall any such signing" (283).

As was pointed out by Judge Croake in deciding plaintiff's motion for summary judgment, such testimony should be disregarded (24). No other evidence was offered by defendant to refute the proof that he executed the September 30, 1969 guarantee.

The September 30, 1969 guarantee provides in pertinent part as follows:

> "As an inducement to you to grant credit or assume a credit risk from time to time in respect or sales of goods made by you to Inter/Continental Wine & Spirits Ltd. ("Inter/Continental") or in respect of any other type of transaction by which you become the creditor of Inter/Continental, the undersigned shall pay to you all amounts up to One Hundred Thousand ($100,000) Dollars (which shall be the limit of the undersigned's liability under this agreement) forthwith when due, or upon demand thereafter, with interest, and without deduction for any claim or setoff or counterclaim of Inter/Continental the full amount of all obligations or indebtednesses due to you from Inter/Continental, together with all expenses of collection and reasonable counsel fees incurred by you by reason of the default of Inter/Continental." (316)

In reliance upon the September 30, 1969 guarantee, plaintiff then assumed liability to the shippers for pending Intercontinental orders and the first shipments were made to Intercontinental in October and November 1969 (96; 319).

B. The Negotiation and Delivery of an Increased Guarantee

Since Intercontinental had submitted further orders to suppliers in Europe beyond the $100,000 of orders on hand on September 30, 1969 (103), on October 8, 1969 Mr. Meier wrote to Intercontinental requesting that the guarantee be increased by $30,000 (322). In a further letter dated November 4, 1969, Mr. Thomann, an officer of plaintiff, repeated the request, reminding defendant that the question of the purchase of convertible bonds had not yet been resolved (324).

On or about November 20, 1969 defendant, together with Mr. Leonard Fellman, an employee of Intercontinental, visited plaintiff's offices in Basle to discuss pending matters (107). Mr. Meier testified that, at that meeting, he specifically asked for the execution of an increased personal guarantee and defendant agreed on the condition that the name of Mr. Fellman (as well as Mr. Kassin) be added as co-guarantor along with defendant (107). Since plaintiff was looking solely to the credit of defendant (110), plaintiff expressed no objection to an additional guarantor (108).

When an additional guarantee did not arrive by the end of 1969, Mr. Meier on January 13, 1970 wrote to defendant

in connection with the increase of the basic amount of his personal guarantee to $150,000 (325). He advised defendant that since Intercontinental was continuing to place further orders with European suppliers, he was forced to insist upon the additional guarantee which had been agreed upon.

On January 19, 1970, plaintiff received a letter dated January 14, 1970, signed by Mr. Kassin, Mr. Fellman and apparently by defendant (326).* The January 14, 1970 letter provided:

> "This will confirm the understanding between us that our agreement dated September 30, 1969 is amended as follows:
>
> Paragraph 1 - is amended to a limit of $150,000 from the present limit of $100,000, all other items to remain the same." (Exhibit 20).

Although neither the Court below nor plaintiff relied upon the evidence that defendant authorized the affixation of his signature on this letter, defendant's denial of such authority was disputed by Ronald Kassin who, in response to an inquiry as to how an authorization to affix defendant's name was granted, testified:

---

* Plaintiff does not contend that defendant's signature on this letter was affixed by defendant (266).

"At one time in a discussion with Mr. Annis, Mr. Fellman and I were both told that if he were out of town or out of state that if anything came up, that he could sign his name" (118).

C. Defendant's Subsequent Agreement to the Amended Guarantee

Although the authority for the execution of January 14, 1970 letter is disputed in the record, there is no dispute that five days later defendant wrote a letter, dated January 19, 1970, to Mr. Meier advising him that the matter had been settled and confirming his agreement to the increase in the $100,000 guarantee to $150,000 (327).

Defendant's January 19, 1970 letter states in pertinent part that:

"The Financial Statement should be ready very shortly and I am certainly in agreement to raise this to $150,000" (327).

Having received the January 14, 1970 letter amending the guarantee together with the confirmation from defendant, plaintiff assumed liability for the payment of a further $50,000 worth of orders for Intercontinental and additional shipments of liquor were then made to Intercontinental (125).

On February 5, 1970, Mr. Meier wrote to Intercontinental complaining that the past due invoices, from the October and November shipments, had not been paid (except for $4,100) and requesting that payments be made on a regular basis thereafter (328-329). In this letter, Mr. Meier emphasized that "the extended guarantee ($50,000 additional) which you have sent us recently" did not solve all the problems, since plaintiff never intended to provide long-term financing to Intercontinental and assumed that the invoices would be paid when due. Since the matter was so serious, Mr. Meier forwarded a copy of the letter to defendant at his address in Florida (126). Thereafter, defendant assured plaintiff that substantial payments would be made on a weekly basis (331) but no significant payments were forthcoming (130). In June 1970 defendant wrote to Adolphe Weitnauer, the president of plaintiff, assuring him that Intercontinental's finances were improving (332-334), and in July defendant advised plaintiff that an equity investment was soon expected which would permit a substantial payment to be made to plaintiff (335-336).

On September 22, 1970, plaintiff wrote directly to the defendant reminding him that over $174,000 was then due and, if Intercontinental could not fulfill the obligations,

that plaintiff would have to invoke the personal guarantee of defendant (338-339). On October 6 plaintiff renewed the demand, and on October 13 (341) and again on November 18 (343). Defendant did not deny his liability on the guarantee but replied by assuring plaintiff that Fellman was doing an outstanding job in reorganizing Intercontinental (342).

On December 9, 1970 plaintiff made a formal demand upon defendant for payment of $150,000 pursuant to the guarantee (344). In response, defendant, on December 16, wrote requesting further forbearance but without disputing liability on the $150,000 guarantee (345).

Following other demands from plaintiff by cable on December 30, by letter on December 31 (346-347) and one from plaintiff's New York attorney in early January 1971, defendant on January 18, 1971 wrote to plaintiff stating:

> "Let me refresh your memory as to the status of the guarantee. First of all this guarantee was agreed to by three parties, Mr. Kassin, Mr. Fellman and myself. An amount of $40,000 was frozen as this was allocated to purchase an option to buy stock when the company went public. An additional $60,000 was credit given to the company, and any amount over $100,000 was jointly guaranteed by the three individuals" (350).

On the same day defendant wrote to Mr. Gottlieb, confirming that "the guarantee is by three people. . ." (349).

On February 19, 1971, thirteen months following the agreement to the increased guarantee and over sixteen months following the execution of the original guarantee, defendant for the first time repudiated any guarantee in a letter to Mr. Thomann.

All of the above facts, except as to defendant's execution of the original guarantee of September 30, 1969 and the letter of January 14, 1970 are uncontroverted in this record.

ISSUES PRESENTED

1. Did the Court below correctly find that defendant executed the September 30, 1969 letter of guarantee of $100,000 plus collection costs and interest?

2. Did the Court below correctly find that defendant agreed to increase the amount of his guarantee of $100,000 to $150,000?

3. Did the Court below correctly find that the Statute of Frauds was satisfied with respect to the increase in the guarantee and that defendant was estopped from denying

the increase in his guarantee to $150,000?

4. Did the Court below correctly find that Intercontinental was indebted to plaintiff in an amount in excess of $150,000?

5. Did the Court below correctly find that defendant's counterclaim, based on its discussions that $40,000 of convertible bonds would be issued by Intercontinental, is without merit because the bonds were never issued and the guarantee bars any set-off or counterclaim?

Summary of Argument

Since plaintiff makes no claim that defendant personally affixed his signature to the January 14, 1970 letter (326), and since neither the Court below nor plaintiff's memoranda below relied upon the substantial evidence of defendant's express authorization for the affixation of his signature to that letter, no refutation of Points I and II of defendant's brief is necessary, except to point out that the evidence of defendant's express authorization is found not only in the testimony of Mr. Kassin, but also in the January 19, 1970 letter (327), in which defendant acknowledged

that he was aware that Mr. Kassin had already "settled the matter" with plaintiff.

Plaintiff sharply disagrees and will refute in this brief defendant's assertions that the Court below incorrectly found (a) that plaintiff failed to establish by a fair preponderance of evidence that defendant executed the $100,000 guarantee (Def.'s Br., Point VI), (b) that the increase in the guarantee was agreed to by defendant (Def.'s Br., Point III), and (c) that the Statute of Frauds was satisfied and that defendant was estopped from denying liability on the guarantee (Def.'s Br., Points IV and V). In addition, plaintiff will also refute appellant's contentions that the evidence of Intercontinental's indebtedness was insufficient to support the judgment (Def.'s Br., Point VIII), and that the Court incorrectly disallowed plaintiff's counterclaim based on the $40,000 credit note (Def.'s Br., Point VII).

POINT I

DEFENDANT'S EXECUTION OF THE SEPTEMBER 30, 1969 GUARANTEE WAS NOT ONLY ESTABLISHED PRIMA FACIE, BUT IS UNCONTROVERTED IN THIS RECORD.

Defendant erroneously asserts in Point VI of his main brief that the "only proof in the record that Mr. Annis signed Exhibit 14, the $100,000 'guaranty' appears in the testimony of Ronald Kassin (Exhibit 43)." (Def.'s Br., p. 25). In order to give this remarkable argument some semblance of plausability, defendant simply ignored the undisputed testimony of Mr. Meier that by mid-September, 1969, defendant orally agreed to provide his personal guarantee in the amount of $100,000 (69-72); that on October 6, 1969, defendant, who lived in Florida, sent a cable from Florida to plaintiff in Switzerland stating, "guarantee signed last week. . ." (314)* and that defendant never disputed or challenged the statement in plaintiff's November 4, 1969 letter to defendant that

> "we . . . would need [for an additional credit of $30,000] the same engagement signed by yourself and Mr. Kassin, as this was done for the $100,000, for which we already possess the guarantee." (324)

* Significantly, the guarantee is dated September 30, 1969, and defendant's cable was dated October 6, 1969 (315).

To make his frivolous argument, defendant is also forced to ignore the undisputed testimony that defendant discussed and agreed to increase his $100,000 personal guarantee at the November 20, 1969 meeting in Basle (107); that on January 13, 1970, plaintiff wrote reminding defendant of his oral agreement to increase the guarantee (325); and that in his January 19, 1970 letter, defendant answered by agreeing to the increase in the guarantee to $150,000 (327).

For defendant to suggest that the only proof of defendant's execution of the guarantee was the testimony of Mr. Kassin is, to put it mildly, a gross distortion of the proof adduced upon the trial. Indeed, neither the Court below nor the plaintiff relied upon Mr. Kassin's testimony to establish defendant's execution of the guarantee. Defendant's brief, therefore, simply draws the Court's attention to additional evidence that defendant executed the guarantee, thereby lending further corroboration to the truly overwhelming evidence summarized above.

Defendant argues that an adverse inference should be drawn from the fact that Mr. Gottlieb, plaintiff's New York counsel in this matter, was not called as a witness by plaintiff. However, there is no evidence that Mr. Gottlieb ever

met defendant or any of the principals of Intercontinental and, thus, there is no basis for inferring that he could give testimony bearing on any of the issues in this action. The evidence in fact is that the guarantee was merely "delivered" to him (314; 93-94).

Defendant also misstates the record by claiming that the form of guarantee as prepared by Mr. Gottlieb was presented to Mr. Annis for signature and "he would not sign it" (Def.'s. Br.,p. 26). In fact, Mr. Meier testified

> "Now either they had the document with them or I presented it again to them. They gathered in one corner of the room. I was standing a little to and outside because they had discussions among themselves. Finally, I was told that they are not going to sign the document here because they would like to have further exchange of views between them and consult their lawyers. . ." (87).
> (Emphasis added)

Defendant likewise asserts that an adverse inference should be drawn from plaintiff's decision not to call Mr. Keiser, a former employee of Intercontinental, which defendant had organized and of which he was a principal (Def.'s. Br., p. 26). Mr. Keiser was a witness equally available to both plaintiff and defendant, and there is simply no evidence that Mr. Keiser was an employee, agent or otherwise subject to

plaintiff's supervision and direction (283-284). In fact, defendant had every opportunity to subpoena Mr. Keiser and to call him as a witness, having been in communication with him earlier on the very day of trial (284). The Court, moreover, afforded defendant an opportunity to call Mr. Keiser as a witness and thereafter defendant's counsel elected not to call Mr. Keiser as a witness (285). Under these circumstances, defendant's argument that an inference adverse to plaintiff should be drawn from the failure of either side to avail itself of an equal opportunity to call Mr. Keiser is totally without foundation.

Defendant's attempts to persuade this Court that Mr. Hilton's conclusion that defendant had executed the September 30, 1969 guarantee are not well founded. Defendant relies upon the portion of Mr. Hilton's testimony concerning the fact that the signature had been started and repeated because the pen had gone dry between strokes (Def.'s. Br., p. 27). This statement proves only that Mr. Hilton had made an exceedingly careful examination of the signature in reaching his conclusion that defendant had signed that document. The further quote from Mr. Hilton's testimony is taken from two questions and answers given during cross examination, in which Mr. Hilton

stated that his conclusion was based on the fact "that there was no evidence that clearly points away from genuineness" and that had there been such evidence, it would have affected his ultimate opinion. The defendant's counsel has, however, failed to point to any evidence in this record indicating that the September 30, 1969 guarantee is not genuine.

In summary, Judge Carter's finding that the defendant executed the September 30, 1969 guarantee (451) is amply supported by the uncontroverted evidence in this record

POINT II

DEFENDANT'S KNOWLEDGE OF AND SUBSEQUENT AGREEMENT TO THE INCREASE IN THE GUARANTEE IS ESTABLISHED BY THE UNCONTROVERTED TESTIMONY AND DOCUMENTS.

Point III of defendant's brief argues that no agreement to the increase in the guarantee was established as a matter of law because plaintiff failed to show defendant had knowledge of the January 14, 1970 letter (Def.'s. Br., pp. 15-18). To prove that defendant lacked knowledge sufficient to agree to the increase in the guarantee, defendant first claims Exhibit 39 is "the only evidence that specifically refers to the terms of the alleged guaranty of $150,000.00" and then asserts that Meier's testimony proves that defendant did not know of the January 14, 1970 letter (Def.'s Br., pp. 15-16).

A. Defendant's Agreement to the Increase in the Guarantee.

Obviously, the requisite knowledge of the increase could be obtained without seeing the January 14 letter, and that is precisely what occurred. Defendant's knowledge of and agreement to the increase is shown by the following undisputed and unquestioned documentary evidence:

1. The letter of January 19, 1970 (327), which was

indisputably mailed several days after the January 14 letter and after defendant had spoken to Mr. Kassin in New York, explicitly states, "I am certainly in agreement to raise this to $150,000."* In light of the fact that a writing increasing defendant's guarantee to $150,000 had just been sent from New York, the obvious meaning of defendant's statement is that he not only learned that the letter increasing the guarantee (326) bearing his signature had been sent, but that he had specifically agreed to such increase. This inference is virtually inescapable in light of plaintiff's constant and and repeated insistence on defendant's personal guarantee of an increase since October 6, 1969 (103; 322-325), as well as defendant's explicit consent to that increase at the November 20, 1969 Basle meeting (107).

2. Since his receipt of plaintiff's November 4, 1969 letter (324), defendant had known that the terms of the increased guarantee would be the same as the initial guarantee of $150,000 and would include defendant:

> "Mr. Kassin recently asked Weitnauer Trading Company Ltd. for an addi-

*The January 14 letter was prepared on Intercontinental's letterhead and apparently was sent from Intercontinental's New York office. The January 19 letter confirms that defendant called Intercontinental from Florida after receiving plaintiff's January 13, 1970 letter to him (addressed to Tampa, Florida), insisting on a $50,000 increase in defendant's personal guarantee (325).

> tional credit of $30,000. We informed Mr. Kassin that, for this purpose, we would need the same engagement signed by yourself and Mr. Kassin, as this was done for the $100,000. for which we already possess the gua antee." (Emphasis added.) (324)

3. Plaintiff's February 5, 1970 letter to Intercontinental (3[illegible]), a copy of which was mailed to defendant in Florida, explicitly refers to "the extended guarantee ($50,000 additional) which you have sent us recently" (emphasis added). Defendant, as we have shown in the preceding paragraph, had long been aware of plaintiff's insistence on his guarantee of $50,000 increase. The evidence is uncontroverted that he received a copy of that letter and must have known that plaintiff sent it to him because he was bound by the increased guarantee. Defendant must have thought so too since he remained silent.

4. Defendant was again effectively placed on notice of his increased guarantee on September 22, 1970, when plaintiff asked defendant politely for payment of the amount due (which was approximately equal to $150,000) from either Intercontinental or defendant under the guarantee (338) and this notice was given again and again thereafter on October 6 and November 18, 1970 (340; 343). Significantly, not once did defendant respond to any of those letters by disputing that his personal

liability covered virtually the full amount Intercontinental owed plaintiff.

5. The formal demand sent to defendant on December 9, 1970 (344) specifically describes the $50,000 amendment dated January 14, 1970. Defendant did not disclaim his knowledge and approval of the increased guarantee on which he was explicitly said to be bound but answered that Mr. Fellman should discuss the situation with plaintiff (345).

6. In reply to defendant's letter (345), on December 30, 1970, plaintiff again placed defendant on notice of the plaintiff's understanding that he had increased his personal guarantee by cabling defendant as follows:

> "REFERRING VISIT MR. FELLMAN STOP
> NEED URGENTLY BEFORE END OF YEAR
> 1970 DOLLARS ONE HUNDRED AND FIFTY
> THOUSAND PLEASE ARRANGE TRANSFER
> SWISS BANK CORPORATION NEW YORK
> AND CONFIRM" (346).

Plaintiff confirmed the cable and this demand for $150,000 in its December 31, 1970 letter to defendant. (346).

7. Defendant's reply of January 18, 1971 (349) to this letter and Harry Gottlieb's letter confirms not only his knowledge of the terms of the increased guarantee, but constitutes specific acknowledgment by him that he had agreed to

the January 14, 1970 letter, or that he considered that the January 19, 1970 letter constituted his direct agreement to the increase. In his January 18, 1971 letter, defendant states:

> "First, the guarantee is by three people and there are very definite limitations on this guarantee." (emphasis added)

The only guarantee to which defendant could have referred in this letter was the full $150,000 since only the increased guarantee was given by three people, namely, defendant himself, Mr. Kassin and Mr. Fellman. The following undisputed documentary evidence established, moreover, that defendant knew that only two persons had given the initial $100,000 guarantee:

(a) It is a reasonable inference that when defendant, an experienced businessman, signed the initial guarantee (316-318), he knew who else joined in that guarantee and that only one other person, Mr. Kassin, had done so.

(b) On November 4, 1969, plaintiff informed defendant in writing (324) that only his signature and Mr. Kassin's appeared on the September 30, 1969 guarantee.

(c) On November 20, 1969 in Basle, defendant insisted that Mr. Fellman join defendant and

Mr. Kassin in the guarantee as a condition to increasing defendant's personal guarantee to $150,000 (107-108). Thus defendant himself not plaintiff insisted on a third individual joining the personal guarantee (107-108).

In view of this evidence, defendant unquestionably had reference to the January 14, 1970 letter in his January 18, 1971 letter when he unequivocally stated that "the guarantee is by three people".

8. Defendant's January 18, 1971 letter, written in response to repeated demands for payment of $150,000, also confirms that defendant recognized that he was bound on this guarantee:

> "I have made a counter-offer to Weitnauer as of this date and would suggest this matter can be clarified to everyone's satisfaction without the necessity of legal action." (349)

9. As the Court below emphasized (452), defendant's January 18, 1971 letter to Weitnauer (350) conclusively establishes that defendant knew of the increase in the guarantee to $150,000 and had ratified and agreed to its terms.

> "I am now back in Tampa and Leonard Fellman has told me about his visit with you and about his agreement with

you regarding the outstanding debt. Before we go into details, let me refresh your memory as to the status of the guarantee. First of all this guarantee was agreed to by three parties, Mr. Kassin, Mr. Fellman and myself. An amount of $40,000 was frozen as this was allocated to purchase an option to buy stock when the company went public. An additional $60,000 was credit given to the company and any amount over $100,000 was jointly guaranteed by the three individuals." (Emphasis added.)

In light of this overwhelming and undisputed documentary evidence, in large part consisting of defendant's own written admissions, defendant's argument that he did not know of, or ratify or agree in the letter of January 19, 1970 to the increase, is utterly frivolous.

Furthermore, defendant never denied that he became aware of the affixation of his name to the January 14 letter prior to sending the January 19 letter. His sole testimony during the entire trial was that he had not signed it himself nor authorized anyone else to sign on his behalf (281). The failure even to controvert either Mr. Meier's testimony, or the correspondence, fully confirms that defendant was aware of the affixation of his signature prior to mailing the January 19, 1970 letter (327).

Plainly, the record fully supports the conclusion of the Court below that defendant "committed himself to the $150,000 guarantee for which he is being sued." (452)

B. The spurious reference to the "Bank Guaranty"

In Point IV, defendant argues that the only evidence of any guarantee related to the so-called "Bank Guaranty". Such a conclusion would require the Court to ignore all correspondence other than the September 22, 1969 letter (308). Similarly to find that this letter was "the only occasion" on which any guarantee was described (Def.'s Br. p. 18) would require the complete rejection of the entire testimony of Mr. Meier.

The record confirms, however, that Mr. Meier's testimony is uncontroverted. Defendant had the opportunity to dispute Mr. Meier's narrative of the events on the evening of the "21" Club dinner meeting in September, 1969, but defendant chose not to refute that testimony. Defendant had the opportunity to challenge Mr. Meier's account of the November 20 meeting in Basle but defendant chose not to do so. Moreover, the correspondence fully confirms Mr. Meier's testimony, and is also uncontroverted in this record. Defendant's Point IV completely ignores the November 4,

1969 letter (324) specifically confirming defendant's execution of the September 30, 1969 guarantee. It totally disregards defendant's telegram confirming his signature on the guarantee (315) as well as defendant's confirmation set forth in the January 19, 1970 letter - "I am certainly in agreement to raise this to $150,000." (327). On the other hand, the record is bereft of evidence that this correspondence, or any of the other correspondence related to any "Bank Guaranty". In fact, no bank guaranty was placed in evidence by defendant at trial, and one cannot even determine the terms, or duration of such guaranty, nor even the bank to whom the guaranty was offered. The Court below correctly concluded that:

> "The correspondence between the parties refers to defendant's guarantee in order for plaintiff to assume responsibility for orders of Intercontinental to various European suppliers. Defendant's guarantee to a New York bank would have no reference to that." (454)

POINT III

THE JANUARY 19 LETTER, READ TOGETHER WITH THE JANUARY 13 LETTER, FULLY SATISFIES THE STATUTE OF FRAUDS, AND, DEFENDANT IS ESTOPPED FROM DENYING HIS LIABILITY ON THE INCREASED GUARANTEE

The Court below found that the Statute of Frauds did not bar the enforceability of defendant's agreement to increase the guarantee for two reasons: first, that the letters of January 13 (325) and January 19 (327) fully satisfied the Statute of Frauds (453) and, secondly, that defendant, having induced plaintiff to act in reliance upon the increase in the guarantee, was estopped from his denying his liability thereon (454).

A. The letters of January 13 and January 19 satisfy the Statute of Frauds

Point V of defendant's brief challenges the Court's conclusion that the January 19 letter, read together with the January 13 letter, satisfies the Statute of Frauds, on two grounds. First, that it was error to admit the January 19 letter into evidence and, secondly, that the two documents lacked *in praesenti* intent of the parties to form a binding agreement (Def.'s. Br., p. 23).

The overwhelming evidence that defendant, in fact, executed the letter of January 19, 1970 is uncontroverted (279-283). The signature appears upon the stationery of the defendant, and the letter was received by Mr. Meier in the ordinary course of business in response to his letter to defendant of January 13 (325;124). Furtheremore, the handwriting expert, Mr. Hilton, having compared the initialled signature to twelve concededly genuine initialled exemplars (359-359A-2), testified that the signature on the January 19 letter was that of defendant (250).

Defendant also did not dispute that he had written the January 18, 1971 letter in which he conceded that he had given the guarantee by his statement that "the guarantee is by three people" (349). Clearly the Court properly overruled the objection to the admissability of the January 19 letter.

Section 5-701 of the General Obligations Law provides that every "promise to answer for the debt . . . of another person" is unenforceable,

> "Unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith."

It is respectfully submitted that the letters of January 13 and January 19 read together, with the September 30, 1969 guarantee,

constitute a classic memorandum sufficient to satisfy the Statute of Frauds.

The basic criteria for such memorandum were set forth by Judge Cardozo in Marks v. Cowdin, 226 N.Y. 138 (1919). There, the Court held that the adequacy of a memorandum depends upon the degree of certainty attained when its words are applied in the context of the facts:

> "The memorandum exacted by the Statute does not have to be in one document. It may be pieced together out of separate writings connected with one another either expressly or by the internal evidence of subject-matter and . . .
>
> "It is not even necessary that they be writings from the promisor to the promisee. They may be from the promisor to his own agent . . . To give heed to these things is not to ignore the rule that the writing must contain all the material terms of the agreement."
> 226 N.Y. at 145

In defendant's January 19, 1970 letter the word "this" in the statement

> "I am certainly in agreement to raise this to $150,000"

indisputably refers to the original guarantee of September 30, 1969. On its face, the September 30 guarantee contains all the material

terms of the agreement and, as amended by Exhibit 21, expresses a complete new agreement. The fact that the memorandum, indisputably subscribed by defendant, does not on its face contain all of the terms, is of no moment. Indeed, the Court of Appeals has definitively adopted the rule permitting signed and unsigned writings to be read together, provided that they clearly refer to the same subject matter or transaction. Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48 (1953).

Defendant, however, argues that the January 19 letter contains evidence of nothing more than in futuro intent to agree. Significantly, defendant ignores the fact that the preceding sentence acknowledges receipt of plaintiff's letter of January 13, in which the request for the guarantee was reiterated (325) and then acknowledges that Mr. Kassin (the President of Intercontinental in New York) "has this matter settled with you". The operative language, "I am certainly in agreement to raise this to $150,000" obviously reflects in praesenti intent. Indeed, if anything, it connotes confirmation of a previously reached understanding.

Defendant's attempt to distinguish the Crabtree case is equally disingenuous. Unlike Solin Lee Chu v. Ling Sun Chu, 9 A.D. 2d 888 (1st Dep't 1959), the January 19 letter was not prepared

by plaintiff or his representative, but was a letter signed by defendant on his own stationery. Defendant's reliance upon Brause v. Goldman, 10 A.D. 2d 328 (1st Dep't 1960) is equally misplaced, since the letter in question there expressly disclaimed any intent that it be taken as a memorandum of agreement.

Although the reading of the letters of January 13 and January 19, with the September 30 guarantee (the latter two of which were signed by defendant), should alone satisfy the Statute, clearly in the context of correspondence signed by plaintiff or Intercontinental (322, 323, 431 and 432) and referring to the increase in the guarantee, there can be no dispute that the January 19 letter contains all of the material terms of the agreement.

Although not relied upon by the Court below, Exhibit 36, "First, the guarantee is by three people and there are very definite limitations on this guarantee" (349), read together with the September 30 guarantee and the January 19, 1970 letter, constitutes an admission that defendant was one of three people bound by the personal guarantee. Since Exhibit 36 refers to a guarantee by three people and the September 30, 1969 guarantee is by only two persons, it could only refer (and indeed confirm

defendant's total commitment) to the $150,000 guarantee which was undertaken by three people.

Taken together these writings of the defendant himself overwhelmingly establish that he had agreed in writing to a guarantee of $150,000. The validity of the approach of piecing together separate writings to satisfy the Statute of Frauds has been repeatedly followed in the courts of this State. LaLonde v. Modern Album & Finishing Co., 38 A.D. 2d 960, 331 N.Y.S. 2d 889 (2d Dep't 1972); Torreggiani v. Coffee of Colombia, Inc., 49 Misc 2d 785, 268 N.Y.S. 2d 649 (Civ. Ct. N.Y. Cty. 1965).

Plainly, the Court below correctly concluded that defendant's agreement to the $150,000 guarantee has been shown by the writings in evidence which fully satisfied the Statute of Frauds.

B. Having Accepted the Benefits of Plaintiff's Reliance Upon the January 19 letter, Defendant is Estopped from Denying Liability Upon the Increase in the Guarantee.

In order to apply the traditional doctrine of equitable estoppel, the Court of Appeals has held that four elements must be present

> "(1) The act of parol performance must be referable to the alleged agreement and no other. (2) They must be such as render it a fraud on the defendant, to take advantage of the contract not being in writing. (3) The agreement to which they refer must be such as in its own nature is enforceable by the court. (4) There must be proper evidence of the parol agreement. (Fry on Specific Performance [Am.Ed.], 251.)" Rindge v. Baker 57 N.Y. 209, 218 (1874)

In the case at bar, there can be no doubt that the parol performance (plaintiff's payment of a further $50,000 of Intercontinental orders) was referable to defendant's oral agreement in Basle (107) and his January 19, 1970 letter agreement to increase the guarantee. Furthermore, the evidence of the parol agreement reached in Basle at the November 20, 1969 meeting, and the agreement reflected in defendant's January 19, 1970 letter, is uncontradicted in this record. Furthermore, plaintiff's reliance on the increase is established by its February 5, 1970 letter (328-329).

To apply the doctrine of equitable estoppel, notwithstanding the statute of frauds, it must be clear that denial of liability by defendant would work a fraud upon plaintiff. The courts have made clear that to apply estoppel one need not

establish an intent to defraud, but merely an over-reaching which would impose an unfair one-sidedness to the transaction. McKinley v. Hessen 202 N.Y. 24 (1911). Indeed it has been held that

> "a party may not, even innocently, mislead an opponent and then claim, benefit of his deception." Romano v. Metropolitan Life Ins. Co., 271 N.Y. 288 (1936).

The record abundantly supports the conclusion that defendant's extremely belated attempted repudiation of the guarantee (354-355) was nothing more than an effort to benefit by a deception imposed upon plaintiff. Even if defendant had not intended to deceive plaintiff by his assurances of an increased guarantee at the November 1969 Basle meeting and in the letters of January 14 and 19, 1970, there can be no question that the repudiation, following the repeated requests for forebearance when defendant concededly knew of plaintiff's reliance upon the increase, if successful, would effectively defraud plaintiff. In view of such deception, the Court below correctly applied the doctrine of equitable estoppel to bar defendant's repudiation. Electrolux Corp. v. Val-Worth, Inc., 6 N.Y. 2d 556 (1959); Bisbing v. Sterling Precision Corp. (3rd Dep't 1970) 34 A.D. 2d 427.

POINT IV

THE RECORD CLEARLY ESTABLISHES THAT INTERCONTINENTAL WAS INDEBTED TO PLAINTIFF IN THE AMOUNT OF $171,158.60 AND PLAINTIFF IS ENTITLED TO RECOVER $150,000, TOGETHER WITH INTEREST AND EXPENSES.

A. In Its Pleading, Plaintiff Has Admitted the Allegations that Intercontinental Was Indebted to Plaintiff in an Amount "in excess of $15,000.00."

Rule 8(d) of the Federal Rules of Civil Procedure provides "averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." The ad damnum clause of the complaint is set forth in paragraph "11", and the allegations of paragraph "8" refer solely to the indebtedness of Intercontinental and not to the extent to which plaintiff has been damaged by defendant's failure to honor the guarantee. Indeed, in defendant's answer, the allegations of the ad damnum clause, paragraph "11", are denied, but by virtue of Rule 8(d), the allegations of paragraph "8" as to Intercontinental's indebtedness, are admitted.

Although the pleading may be amended to conform to the proof, no motion for such relief was offered by defendant, and although the Court indicated it would accept defendant's proof that a lesser amount was owing (178), defendant chose not to offer any at trial.

B. The Evidence of the Intercontinental Indebtedness of $171,158.60 is Uncontroverted in the Record

Plaintiff's account ledger for Intercontinental sets forth a complete statement of all transactions between Intercontinental and Weitnauer (319-321). In view of Meier's testimony that the ledger was kept in the ordinary course of business and that he supervised the xeroxing of the ledger (97), the Court properly admitted the copy into evidence. 28 U.S.C. §1732; CPLR Rule 4539. A complete explanation of the headings to the various columns was fully defined by Mr. Meier (101). The fact that it did not account for the profit on the commissions to be shared with defendant individually pursuant to the October 1968 commission sharing agreement between defendant and plaintiff (292-293) is irrelevant, since Intercontinental had no interest in those profits. Furthermore, defendant had specifically requested that plaintiff keep his interest in those commissions "a confidential matter" so that it would not be discussed with his colleagues in Intercontinental in

in New York (307). The 4% portion of plaintiff's 10% commission, which was to be held for Intercontinental's expenses in Europe, is set forth as the final item on plaintiff's ledger - $6,309.46 (321). Furthermore, plaintiff's ledger is confirmed by defendant's Exhibit A (425-428), which Mr. Meier testified was a record kept especially to reflect the 4% credits due to Intercontinental, which also was kept in the ordinary course of business, and was derived from creditors' invoices and invoices to Intercontinental (183-184). Again, Mr. Meier translated on the German headings on that schedule into English (184).

Defendant relies upon the fact that certain brands of whiskey were bottled by Intercontinental and, therefore, the suppliers' invoices would not be identical to the amount charged to Intercontinental, since the cost of corks, labels and cartons would have to be added (Def.'s Br., p. 31). There is absolutely no support in the record, however, for defendant's assertions that Intercontinental was responsible solely for invoices by suppliers to plaintiff. (Indeed, Mr. Meier specifically testified that Intercontinental was billed only at cost plus a 10% commission, of which 3% represented Intercontinental's sole profit (67-69)). Furthermore, a copy of the ledger with interest through August 31, 1970 was forwarded both to Intercontinental and the defendant, without objection (338). Furthermore, Mr. Meier testified that the total indebtedness was $171,158.60 (174), on total sales of $175,000 (178), and in all

the correspondence between the parties the amount of the Intercontinental indebtedness was never challenged. Of course, the defendant had ample opportunity to offer proof to controvert the indebtedness reflected in plaintiff's ledger (319-321) or plaintiff's schedule of defendant's commissions (425-428) but chose not to do so.

Defendant's reliance upon a sentence from the opinion of Judge Croake (Deft's. Br., p. 32) is disingenuous at best, since in the quoted sentence Judge Croake was addressing himself to the defense that the liquor delivered was damaged. This affirmative defense was abandoned by defendant, who chose to offer no supporting evidence at trial.

Clearly, the record fully supports the finding that the defendant was liable for $150,000 of the indebtedness of Intercontinental, together with interest, costs and expenses.

POINT V

PLAINTIFF HAS TOTALLY FAILED TO ESTABLISH ITS FIRST COUNTERCLAIM RELATING TO THE CONVERTIBLE BONDS

A. There is No Evidence that Intercontinental Either Created a Capital Structure Which Permitted the Issuance of Convertible Bonds, or Issued or Tendered Any Bonds to Plaintiff

The uncontroverted testimony of Mr. Meier is that no bonds were ever issued, much less tendered, to plaintiff (212) and the Court below so found (454). Furthermore, the testimony of Mr. Meier establishes that the capital structure of Intercontinental was never defined during the initial discussions in 1969 (58) nor at any time thereafter. The plaintiff never learned what portion of the company it could acquire upon the conversion of the alleged bonds (59). In addition, there was never an understanding reached with respect to the term of the bonds or the period of conversion (212).

The failure to establish a capital structure is confirmed by the correspondence. See for example, defendant's July 30, 1970 letter (335-336), in which the defendant indicated that various capital structures were the subject of negotiations with

two potential investing groups. At that time, however, all discussion of the proposed convertible bonds had been abandoned.

B. Even if Bonds Had Been Issued and Tendered to Plaintiff, the Claim for Payment Would at Most Be a Setoff in Favor of Intercontinental, and Not Defendant

The Court below correctly found that "the guarantee specifically bars any set-off or counterclaims as to Intercontinental" (454). The terms of the guarantee explicitly provide:

> "the undersigned shall pay to you all amounts up to One Hundred Thousand ($100,000) Dollars. . . forthwith when due, or upon demand thereafter, with interest, and without deduction for any claim or setoff or counterclaim of Inter/Continental, the full amount of all obligations or indebtednesses due to you from Inter/Continental, together with all expenses of collection and reasonable counsel fees incurred by you by reason of the default of Inter/Continental." (316) (Emphasis added.)

No proof was offered that Intercontinental ever asserted a claim in connection with the proposed convertible bonds and thus under the explicit terms of the guarantee the affirmative defense would have to fail even if bonds had been issued and tendered.

Defendant's attempt to treat the claim set forth as its first counterclaim, as "recoupment" and not a "setoff" (Deft's. Br., p. 29), is a distinction without a difference. Obviously, the anticipated acquisition of the "convertible bonds" was a transaction involving merchandise completely distinguishable for the liquor purchased upon plaintiff's credit and delivered to Intercontinental.

Furthermore, even if the guarantee in suit failed to expressly bar counterclaims and offsets of Intercontinental, defendant would still be barred from asserting any claims of Intercontinental under the settled rule of law that a guarantor may not avail himself of his principal's claims. Ettlinger v. National Surety Company, 221 N.Y. 467 (1917). There the Court held

> "A party when sued upon his obligation cannot avail himself of an independent cause of action [there fraud inducing the contract] existing in favor of his principal against the plaintiff as a defense or counterclaim. It is for the principal to determine what use he will make thereof, and the surety has no control over him in this respect."

Recently, the Appellate Division applied this long-standing rule to preclude a guarantor from asserting even a defense based upon

defects in the merchandise sold to the principal debtor. Rhodia, Inc. v. Steel, 32 A.D. 2d 753, 300 N.Y.S. 2d 1005 (1st Dep't 1969).*

C. The Guarantee Would Apply to the $40,000 Obligation if One Were to be Found.

In any event, the advance reflected by the credit note to Intercontinental was merely a further obligation of Intercontinental fully secured by the terms of the guarantee itself. The guarantee in pertinent part:

> "1. As an inducement to you to grant credit or assume a credit risk . . . in respect to any other type of transaction by which you may become the creditor of Inter/Continental the undersigned shall pay to you all amounts up to One Hundred Thousand ($100,000) Dollars. . ." (Exhibit 14) (Emphasis added.)

Therefore, even assuming that Intercontinental had extended $40,000 of credit in exchange for a convertible bond (Exhibit 7-A), defendant's personal guarantee fully applies to that credit under the clear and unambiguous terms of the guarantee. Accordingly, even if the Court were to find that plaintiff had agreed to lend $40,000 to

* The holding of these cases and the terms of the guarantee also bar the second affirmative defense based upon allegedly defective merchandise, a defense which was abandoned by defendant's failure to offer any supporting evidence at trial.

Intercontinental in lieu of the "convertible bonds", defendant's personal guarantee applies to that loan.

Plainly, the record fully supports the conclusion of the Court below that this counterclaim was without merit.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed in every respect.

Respectfully submitted,

WIKLER GOTTLIEB TAYLOR & HOWARD
Attorneys for Plaintiff-Appellee
Office & P. O. Address
40 Wall Street
New York, New York 10005
Tel. No. HA 2-1080

LANKENAU KOVNER & BICKFORD
Trial Counsel for Plaintiff-Appellee
Office & P. O. Address
30 Rockefeller Plaza
New York, New York 10020
Tel. No. 489-8230

Of Counsel:

Victor A. Kovner, Esq.
John C. Lankenau, Esq.

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS: SECOND CIRCUIT

WEITNAUER TRADING CORP.,
Plaintiff-Appellee,

- against -

ANNIS,
Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 29th *day of* January *19*75 *at* 99 Park Ave., New York

deponent served the annexed Appellee, ~~Brief~~ Brief *upon*

Richman, Krirsley, Poses, Katz & Lizzienslem

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 29th
day of January *19*75

Victor Ortega

VICTOR ORTEGA

ROBERT T. [illegible]
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0112950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975